

discriminate or otherwise distort competition.¹⁴ The process of laying the regulatory and procedural groundwork, both within the European Union and in France, for complete liberalization by January 1, 1998 is also well underway.¹⁵ FT urges the Commission to recognize these significant developments in establishing the public interest factors that it would apply to entry by a non-U.S. carrier.¹⁶

C. The Commission Should Consider the Overall Public Interest Benefits of a Transaction that May Include, as One Element, a Non-U.S. Carrier Investment in a U.S. Service Provider.

The Commission states that it would consider, among other public interest factors, "the general significance of the proposed entry to promotion of competition in global markets."¹⁷ FT urges that the Commission broaden this public

14. Today, and after January 1, 1998, FT is and would be unable to leverage any market power it might have because it is legally obliged under the laws of the European Union and France not to discriminate against competitors; competitors complaining of illegal discrimination have effective legal administrative and judicial recourse available at the European Union and within France; and the European Commission and the principal French regulatory body, the Direction Générale des Postes et Telecommunications ("DGPT"), have demonstrated that they are committed to safeguarding competition.

15. EU Telecommunications Council, Resolution of November 17, 1994.

16. In this regard, in establishing and applying the public interest factors of the test, the Commission should not ignore multilateral forums, primarily the basic telecommunications services negotiations now underway in the wake of the Uruguay Round. Progress toward market access is underway here, as in the national or bilateral context. In the basic telecommunications services discussions, the European Union, with the United States, has taken a leading role toward steps that could result in significant liberalization for all global carriers.

17. Notice, at ¶ 45.

interest factor to consider whether the entirety of a transaction, which may include an alliance as well as an investment in a U.S. service provider, is procompetitive or otherwise in the public interest. This approach would treat consistently all significant relationships between a U.S. service provider and a non-U.S. carrier, whether they include an actual equity investment in the U.S. entity, a co-marketing arrangement, or the establishment of a new joint venture entity outside the United States.

In general, the Commission's proposal appears to assume that the purpose of a non-U.S. carrier's investment in the U.S. service provider is largely to gain "entry" into the U.S. market generally and, specifically, the market for basic, facilities-based international services. In point of fact, this assumption may not always be true. There may well be situations where such an investment may be less significant for the parties, and for the development of competition in the United States and globally, than is establishing and operating a strategic alliance that is able to compete on a global scale with other global service providers.

In some circumstances, the overall size of the investment in the U.S. service provider and of traffic on the route between the United States and the home country of the non-U.S. carrier may mean that any economic incentives to discriminate in basic international services would be relatively minor. The Commission should ensure that its test does not preclude the possibility that any such small incentives to discriminate might well be outweighed by the sizable, procompetitive benefits that might result from the other aspects of the transaction. In summary, although the Commission might conclude that an investment by a non-U.S.

carrier, standing alone, would not pass the effective market access test, it could also conclude that the other public interest benefits of the larger transaction with which such investment is coupled justify authorizing such entry by the non-U.S. carrier.

III. TO THE EXTENT AN INVESTMENT RAISES REAL DISCRIMINATION CONCERNS, SUCH CONCERNS SHOULD BE DEALT WITH BY ADDRESSING THE POTENTIAL FOR DISCRIMINATION, NOT BY DENYING THE INVESTMENT.

The Commission is quite properly concerned with the incentives for and possibility of discrimination against a carrier in a market outside the United States. As noted, FT fully shares this concern and applauds the Commission's initiatives in this respect. It is for this reason that FT believes that the Commission's efforts should, with respect to non-U.S. carrier investments that do not constitute control, be concentrated on detecting and eliminating discrimination, and not on determining whether U.S. service providers have effective market access in such carrier's home market.¹⁸

FT believes that, in general, the requirements imposed on MCI in approving the BT-MCI transaction are adequate to ensure that a carrier that has monopoly control over bottleneck facilities in its home market will not be able to

18. The Commission should consider that, with the gradual erosion of the traditional bilateral correspondent relationships over time, the incentives to engage in the unlawful discriminatory practices with which it expresses concern are likely to be reduced. Today's marketplace realities -- the demands of sophisticated users, the increasing provision of services on a global basis, and the creation of alliances -- will lessen incentives to discriminate: global carriers must deal with members of rival consortia and, if they discriminate, they may, in turn, be subject to retaliatory discrimination by their competitors.

discriminate against a U.S. service provider on the United States-home country route.¹⁹ As the Commission noted in the context of that approval, whether such requirements are, in fact, adequate should be determined in light of the state of regulation, including the development of regulatory safeguards and the existence of an independent regulatory authority, in the home country.

FT, for example, is subject to significant legal and regulatory requirements that would, in the context of its proposed venture with Sprint, prohibit it from discriminating in Sprint's favor, even assuming that it had an incentive to do so:

- The Services Directive of the European Union required France immediately to "take the necessary measures to make the conditions governing access to the networks objective and nondiscriminatory."²⁰
- The Open Network Provision ("ONP") Framework Directive of the European Union establishes that FT must afford access to its networks on the basis of conditions that must be based on objective criteria; be transparent and be published in an appropriate manner; and guarantee equality of access and be nondiscriminatory.²¹
- The European Commission has published guidelines that describe the types of practices, including discrimination in access, provisioning, availability and quality and price of services, that could be violations of

19. FT recognizes that the Commission has tentatively concluded otherwise. Notice, at ¶ 56.

20. Competition in the Markets for Telecommunications Services, Commission Directive 90/388/EEC, 1990 OJ L192/1, Art. 4.

21. Establishment of the Internal Market for Telecommunications Services through the Implementation of Open Network Provision, Council Directive 90/387/EEC, 1990 OJ L192/10, Art. 3.

Articles 85 and 86, the competition provisions, of the Treaty of Rome.²²

- The ONP Leased Lines Directive of the European Union applies the nondiscrimination principle of ONP to all transmission capacity within the public network, and FT's national regulatory authority is required to ensure that FT does not discriminate in making such capacity available.²³
- A French decree fully implements the ONP Leased Lines Directive in France and states expressly that FT must provide leased lines on transparent and nondiscriminatory terms, and on the basis of prices that are nondiscriminatory, cost-oriented and accounted for in a manner that permits independent verification by the DGPT.²⁴ The French government has directly stated that FT is obligated to supply leased lines between France and the United States on a nondiscriminatory basis.²⁵
- The proposed directive applying ONP to voice telephony, recently put forward by the European Commission, would guarantee to all users nondiscriminatory service, including technical access, tariffs, quality of service and availability of information.²⁶

22. Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, 1991 OJ C233/2.

23. Application of Open Network Provision to Leased Lines, Council Directive 92/44/EEC, 1992 OJ L165/27.

24. Decree No. 93-961 (July 28, 1993).

25. July 11, 1994 letter from Bruno Lasserre, Director General of the DGPT, to Deputy Assistant Secretary of State Vonya B. McCann in the exchange of letters that constitutes the U.S.-France Agreement on International Value-Added Networks.

26. Commission of the European Communities, The Commission Proposes a Level Playing Field for Telephone Services, Information Memo (February 1, 1995).

- In 1990, the French law that established FT as an autonomous, public operator requires FT to afford nondiscriminatory treatment to all users of the network.²⁷
- That same year, FT was obligated to provide access to the public network on nondiscriminatory terms and was required to comply with all international regulations and treaties, which would include EU regulations and directives that prohibit discrimination.²⁸

In the European Union, as well as in France, prohibitions on discrimination and other anticompetitive conduct are enforced by regulatory authorities that have demonstrated their commitment to competition in the telecommunications sector. To the extent competitors and others would perceive that FT has engaged in illegal discrimination, they have recourse to the Directorate for Competition of the European Commission (D.G.IV), the French competition authority (Conseil de la Concurrence), the French telecommunications regulatory authority (the DGPT), and French courts.

FT recognizes that the Commission may have concerns with respect to the possibility of discrimination by FT against Sprint's competitors. At least with respect to the proposed non-controlling investment by FT in Sprint, however, the Commission should conclude that the conditions required of BT-MCI, coupled with the array of legal and regulatory strictures in place in Europe and France, are wholly adequate to satisfy those concerns.

27. Law No. 90-568 of July 2, 1990, Concerning the Organization of the Public Post and Telecommunications Service, Art. 8.

28. Decree No. 90-1213 of December 29, 1990, Schedule of Obligations, §§ 11 and 13.

IV. THE COMMISSION SHOULD NOT REQUIRE A U.S. SERVICE PROVIDER AFFILIATED WITH A NON-U.S. CARRIER TO FILE ALL ACCOUNTING RATES THAT SUCH CARRIER MAINTAINS WITH ALL OTHER COUNTRIES.

The Notice proposes that if a facilities-based U.S. service provider is deemed affiliated with a non-U.S. carrier by reason of investment, and is thereby regulated as dominant on the international route to that carrier's country, then that U.S. service provider must file a complete list of the accounting rates that the affiliated non-U.S. carrier maintains with all other countries to ensure that such rates are cost-based, nondiscriminatory and transparent.²⁹ FT shares the Commission's views that accounting rates should be reduced over time and be more cost-oriented. Nonetheless, it believes that such a filing requirement is not likely to be very useful and could, in fact, be counterproductive.

First, the Commission has no jurisdiction over the non-affiliated non-U.S. carrier. Accordingly, it will be quite difficult for the Commission to determine whether any disparities as between (i) the accounting rate for the relationship between the U.S. service provider and its affiliated non-U.S. carrier and (ii) the accounting rate between the two non-U.S. carriers are justified (or not) on the basis of cost, or for some other reason.

Moreover, accounting rates are negotiated on a commercial basis between carriers. Where a non-U.S. carrier has a bilateral relationship with another non-U.S. carrier (which, in turn, has an investment in a U.S. service provider above

29. Notice, at ¶ 87.

the threshold), the carrier that has no contact with the investment may well be reluctant to have its accounting rates, negotiated with an "affiliated" non-U.S. carrier, disclosed to the public. (That carrier's accounting rate with U.S. service providers is, of course, already a matter of public record.) The broad, extraterritorial sweep of the Commission's proposed filing requirement is likely to cause some resentment on the part of the affiliated carrier's own correspondents and their governments. Given this result, and in light of the unlikelihood that the Commission would derive real benefit from such transparency, the Commission should reconsider its tentative view that all such accounting rates be filed.³⁰

30. FT would not object to a system that required all carriers globally to publish all of their accounting rates with their correspondents. However, a system in which only a few non-U.S. carriers -- those "affiliated" with U.S. service providers -- are required to do so may place such carriers at a commercial disadvantage in their relations with their correspondents.

V. THE COMMISSION'S APPROACH TO NON-U.S. INVESTMENT IN RADIO STATION LICENSEES SHOULD BE CONSISTENT WITH THE TEST IT ADOPTS FOR INVESTMENTS IN SERVICE PROVIDERS AUTHORIZED UNDER SECTION 214.

A. No Effective Market Access Test Is Necessary for Investments that do not Constitute Control.

The Commission asks specifically whether the public interest factors that it might consider under an effective market access test should be applied to non-U.S. carrier investment in radio station licensees in light of Section 310(b)(4) of the Communications Act.³¹ FT fully concurs with the Commission's view that there should be consistency between the public interest determinations under Section 310(b)(4) and Section 214.³²

For the reasons stated in Section I of these Comments, FT believes that the same threshold -- actual control -- should be used to determine whether non-U.S. investments in common carriers holding radio station licensees ought to be measured against an effective market access test. That is, for investments that are greater than 25%, but are shy of actual control, the Commission should use the same approach as it does for investments in service providers authorized under Section 214. Obviously, any other result could have the effect of preventing a non-U.S. carrier from making a non-controlling investment in a U.S. common carrier radio station licensee if its home market does not pass the new test, while such an investment would have been

31. Notice, at ¶ 92.

32. Notice, at ¶ 95.

permitted had the investment been made in a service provider holding no radio station licensees. Under FT's proposal, therefore, the Commission would conclude that investments above the 25% statutory ceiling, but not conferring actual control on the non-U.S. carrier, would be in the public interest.³³

B. The Commission Should Use the Same Public Interest Factors in Applying the Effective Market Access Test in the Context of Section 310(b)(4).

Similarly, the public interest factors that would be established and applied by the Commission in the context of Section 310(b)(4) to determine whether the investment by the non-U.S. carrier is permitted in a common carrier radio station licensee should be consistent with those used for a similar investment in a Section 214 carrier. FT's views in this regard are set out in Section II of these Comments. In summary, the Commission should consider the state of competition in the entire telecommunications market, and not just the wireless market (or some subsegments thereof); should look at whether progress is being made toward further liberalization; and should assess the extent to which U.S.-based and other entities are actually competing in the investor's home market.

Where national law or regulation restricts, for example, U.S. investment in a wireless provider offering services to the public, such an approach can create significant incentives to lift the cap. In France, for example, companies

33. Presumably, the Commission could use the existing flexibility that it has under Section 310(b)(4) to deny such an investment in a common carrier radio station licensee for other public interest reasons -- apart from whether the non-U.S. market is adequately open to U.S. service providers.

not established in the European Union are not permitted to hold more than 20% of a public wireless provider, but that ceiling may be raised or removed by the DGPT based on reciprocal treatment in the non-EU market. Although a decision to do so is, of course, entirely within the discretion of the DGPT, FT believes that the approach it is suggesting in these Comments will promote a climate for expediting just such a market-opening measure in France.

Finally, to the extent that the Commission does decide to adopt a threshold for effective market access below actual control, it should adopt and apply the precedent of the BT-MCI transaction to all other transactions where non-U.S. carrier investment in a U.S. service provider holding radio station licenses does not exceed 20%. That is, the Commission should conclude that it is in the public interest, and not inconsistent with Section 310(b)(4), to permit an investment of 20% if a U.S. service provider is willing to adhere to the conditions established by the Commission in the context of BT-MCI. As stated above, any other result would deprive the U.S. service provider of the opportunity to have access to capital from outside the United States, be inequitable and be contrary to the Commission's stated goal of encouraging the development of a competitive global marketplace for telecommunications services.

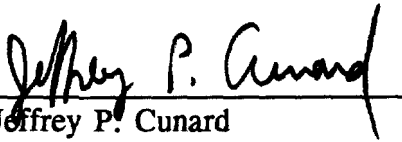
VI. CONCLUSION.

FT applauds the Commission's initiative in launching a proceeding that will result in opening up global telecommunications markets for all carriers. It believes that the approach most likely to succeed would properly differentiate between

actual control and minority investments in determining whether the effective market test should apply; would consider a range of public interest factors, including both actual competition and progress toward liberalization; would take account of and rely on European Union and national prohibitions on discrimination, coupled with the conditions developed and imposed in the context of the BT-MCI transaction; and would treat non-U.S. investments in U.S. common carrier radio station licensees in a consistent fashion.

Respectfully submitted,

FRANCE TELECOM

By 
Jeffrey P. Cunard
Lothar A. Kneifel

Debevoise & Plimpton
555 13th Street, N.W.
Suite 1100E
Washington, D.C. 20004

Its Attorneys

Dated: April 11, 1995